

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 90 of)
the Commission's Rules)
to Clarify and Restrict)
the Scope of the Finder's)
Preference Program)

RM-_____

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To: The Commission

PETITION FOR RULE MAKING
OF THE
THE COUNCIL OF INDEPENDENT COMMUNICATION SUPPLIERS

The Council of Independent Communication Suppliers ("CICS"), pursuant to Section 1.401 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby respectfully submits this Petition for Rule Making seeking to clarify and restrict the scope of the finder's preference program currently in effect under Section 90.173(k) of the rules.

I. PRELIMINARY STATEMENT

1. CICS is an unincorporated association of entities engaged in serving the needs of private radio eligibles, particularly those located in small and rural communities throughout the United States. CICS' membership is open to SMR operators, radio dealers, equipment suppliers, communications engineers and consultants. CICS was formed to provide these entities a voice in the policy-making process governing use of the electromagnetic spectrum,

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especially spectrum allocated to the Private Land Mobile Radio Services. CICS is an independent market council of the Industrial Telecommunications Association, Inc. ("ITA").

II. BACKGROUND

2. In 1991, the Commission implemented the "finder's preference" program under Part 90 of the rules.¹ This program provided a formal mechanism whereby eligible entities could provide the FCC with *prima facie* evidence of violations of the FCC's construction or placed-in-operation requirements by existing private land mobile licensees authorized to use channels on an exclusive basis. In cases where the Commission successfully recovered channels from a licensee as a result of information provided by a "finder," the Commission would grant the "finder" a dispositive preference for the recovered channels.

3. As originally conceived by the Commission, the finder's preference program was well-intended and in the public interest. The Commission envisioned that the program would "expedite reassignment of channels that are not being utilized effectively."² Further, the program would facilitate proper spectrum management by "promoting reassignment of channels to persons who will use them

¹ *In re Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, Report and Order*, PR Docket No. 90-481, 6 FCC Rcd. 7297 (1991).

² *Id.* at 7302.

productively."³ The Commission also noted that the program offered "a means for recapturing unused channels" from "licensees who have failed to construct, place in operation, or continue to operate their stations."⁴

4. The experience gained with the finder's preference program during the past three years shows that, on many occasions, it has fulfilled the lofty objectives anticipated by the Commission in 1991. However, in recent years, the finder's preference program has also tended to take on overtones that are both unpleasant and unproductive. The program is no longer simply a mechanism for ensuring that unused channels are put to good use. Rather, on many occasions, "finders" have used the established procedures to harass licensees and to capitalize on ministerial mistakes that occurred during the application process.

5. In the *Vaughn* case, the "finder" urged the Commission to reclaim channels from a station that had been constructed approximately 0.95 kilometers from its licensed coordinates.⁵ In that case, the Commission declined to grant the "finder" a preference. In its decision, the FCC stated that it would award a

³ *Id.*

⁴ *Id.* at 7303.

⁵ *In re Lawrence E. Vaughn, Jr., Request for a Finder's Preference for Station WNXE819 Licensed to Ross Shade Trust, Order*, adopted August 17, 1994, 9 FCC Rcd. 4438 (1994) ("*Vaughn Order*").

finder's preference for a constructed and operating station only when the authorized coordinates are more than 1.6 kilometers (one mile) from the actual location of the station. The Commission concluded that "[r]ule violations at distances less than 1.6 km. do not lend themselves to conclusive and expeditious action because issues of method of measurement, intent, justifiable reliance, credibility, and good faith arise."⁶

6. The petitioner believes that good cause exists for expanding the standard established in the Vaughn Order. A discrepancy of one mile between the licensed coordinates and the site at which a station was actually constructed could easily be the result of an innocent and unintended error by a licensee or the licensee's misplaced reliance on coordinates provided in good faith by a third party. In the instant Petition for Rule Making, as explained in greater detail below, the petitioner urges the Commission to implement a threshold distance of two miles for purposes of the finder's preference program.

III. PROPOSAL

7. The petitioner believes that licensees should always strive to construct their stations at the authorized coordinates. Nonetheless, it is apparent that there are sometimes significant discrepancies between the coordinates reflected on station licenses

⁶ *Id.* at 4439.

and the site at which the stations were actually constructed. This circumstance is particularly common in the case of stations and transmitter sites established in earlier eras, before the existence of techniques for precisely determining the geographic coordinates of a site. In such cases, the cancellation of a station license for unintended violations of the terms of a license is a particularly harsh and unwarranted sanction.

8. Cancellation of a station license for relatively innocuous violations of the terms of a license is also inconsistent with past FCC precedent. In a 1990 case, for example, the Commission ruled that a licensee had acted properly in constructing its SMR station in Cumberland, Rhode Island, even though the license in effect at the time of construction specified coordinates in Johnston, Rhode Island.⁷ In that case, the Commission determined that a waiver on the Bureau's own motion was warranted because the licensee had no other alternative for satisfying the FCC's rules.

9. The standard set in the Vaughn Order encourages would-be "finders" to go to great lengths to uncover and report ministerial violations of the construction requirement. Spurred by the market value of the channels involved, some individuals have resorted to hiring surveyors to randomly check the transmitter sites for licensed SMR facilities in the hope of identifying stations that

⁷ In re SMR Station WNIX479 Licensed to New England Mobile, Order, adopted March 21, 1990, 5 FCC Rcd. 1948 (1990).

may exceed the one-mile standard. In short, the petitioner believes that reliance on the Vaughn standard has caused the focus of the finder's preference program to shift from identification of channels that are "unused" to identification of unfortunate mistakes by well-intended licensees operating their stations in good faith.

10. The petitioner believes it is in the public interest to create a new standard that will afford some level of protection and comfort to licensees. The petitioner recognizes that a mileage standard that is too liberal could negate, in large part, the intent and effect of the finder's preference rules. On the other hand, an excessively demanding standard runs the risk that licensees will have to forfeit bona fide, fully functioning radio systems as a result of relatively minor errors.

11. CICS urges the Commission to modify the finder's preference program in a way that will protect well-intentioned licensees from being severely penalized for inadvertent errors without undermining the effectiveness of the finder's preference program. Specifically, CICS suggests that the Commission's rules be amended to specify a threshold mileage criterion for valid finder's preference requests. CICS proposes that the scope of the finder's preference program be limited to instances in which the discrepancy between the licensed coordinates and the site of actual construction exceeds two (2) miles. The proposed changes would

insulate, from finder's preference actions, all fully functioning stations that are located two miles or less from their licensed coordinates. The licensees of these stations would thus be assured of continued operation without the threat of harassing actions from overly zealous "finders." The existing finder's preference rules would continue to apply in all cases where the licensed coordinates are more than two miles from the actual transmitter site.

12. CICS believes that the proposed rule changes will provide both an opportunity and incentive for the operators of "insulated" systems to correct the discrepancy between their licensed coordinates and the sites of actual construction. With adoption of the proposed rule, licensees of systems located two miles or less from their licensed coordinates would be immune from finder's preference filings. These licensees, to the extent they are aware of the discrepancies, should have no aversion to filing modification applications to remedy the discrepancies. By submitting applications to correct the coordinates reflected on their authorizations, they would help the Commission to improve the accuracy and reliability of the licensing database. Accordingly, CICS believes that, in conjunction with the proposed rule change, the Commission should encourage the licensees of all systems, particularly those who stand to benefit from the proposed change, to examine their actual geographic coordinates and assess whether the transmitter site is consistent with the licensed coordinates. Where there are conflicts between the actual and licensed

coordinates, licensees should be encouraged to submit appropriate modification applications to correct the discrepancy.

IV. CONCLUSION

13. The petitioner believes the proposed rule amendments will stimulate changes, both tangible and intangible, that will benefit the future growth and maturity of the industry. The proposed changes will also have the effect of ensuring that the finder's preference program satisfies the objectives initially envisioned by the Commission when it implemented this program in 1991. For the reasons stated above, CICS respectfully requests the Commission to initiate a rule making proceeding aimed at modifying the finder's preference program as indicated in the attached Appendix.

WHEREFORE, THE PREMISES CONSIDERED, the Council of Independent Communication Suppliers respectfully submits this Petition for Rule Making and urges the Federal Communications Commission to proceed to place the Petition for Rule Making on Public Notice in accordance with Section 1.403 of the Commission's Rules and Regulations.

**COUNCIL OF INDEPENDENT
COMMUNICATION SUPPLIERS**

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Appendix: Text of Proposed Rule Changes

APPENDIX

It is requested that the Federal Communications Commission amend Part 90 of its Rules and Regulations as shown:

I. Section 90.173(k) is proposed to be amending by revising Section 90.433 as follows:

§ 90.173 Policies Governing the Assignment of Frequencies.

* * * * *

(k) Notwithstanding any other provisions of this part, any eligible person may seek a dispositive preference for a channel assigned on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631(e) or (f), or 90.633(c) or (d). In channel recovery actions under this rule section that are based on an alleged failure to satisfy the construction or placed-in-operation requirements of §§ 90.155, 90.629, 90.631(e) or (f), or 90.633(c) or (d), no dispositive preference shall be awarded if the target licensee establishes, to the Commission's satisfaction, that it has constructed the target station at geographic coordinates that are two (2) miles or less from the coordinates specified in the station license and the licensee has otherwise satisfied all other requirements regarding constructing and placing the station in operation that may be applicable under §§ 90.155, 90.629, 90.631(e) or (f), or 90.633(c) or (d).

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